WARREN L. JACOBS

IBLA 82-591 Decided March 29, 1983

Appeal from decision of the Utah State Office, Bureau of Land Management, canceling oil and gas lease U-40545.

Affirmed in part; set aside and remanded in part.

1. Oil and Gas Leases: Cancellation

Where an oil and gas lease offer when first filed is not accompanied by full payment of the first year's rental, but the deficiency is less than 10 percent of the required amount, and the lease is subsequently issued with a notice that the deficiency must be paid within 30 days under penalty of cancellation, the lease must be canceled pursuant to 43 CFR 3103.3-1 where the required deficiency payment is not submitted within the prescribed period. A 3-year delay by BLM in cancelling the lease does not prevent subsequent cancellation even where BLM never received the deficiency payment for the first year, yet continued to accept the correct annual rental payment for 2 succeeding lease years.

2. Administrative Authority: Laches -- Estoppel -- Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

3. Accounts: Refunds -- Oil and Gas Leases: Rentals

Where a noncompetitive oil and gas lease is canceled for having been erroneously issued because the lease was deficient in the first year's rental, which deficiency was not timely cured, the Department may return the rentals pursuant to the repayment statute, 43 U.S.C. § 1734 (1976), in appropriate circumstances where the lessees have derived no benefit from the possession of the lease or there are no other factors militating against repayment.

APPEARANCES: Gary Schweniman, Esq., of Midvale, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Warren L. Jacobs has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 4, 1982, canceling his oil and gas lease, U-40545, for failure to timely submit additional rental of $40 to cure the deficiency in the original submission of his first year's rental.

The record shows that appellant originally filed an over-the-counter oil and gas lease offer under serial No. U-40545 for 2,540.69 acres of land in Tooele County, Utah, on June 16, 1978. He submitted the advance first year's rental in the amount of $2,501 with the lease offer. BLM determined, upon computation of the acreage involved, that the offer totaled 2,540.69 acres instead of 2,500.69 acres shown on the lease form under item 2, land requested. The lease issued effective December 1, 1979, for 2,540.69 acres and the annual rental at $1 per acre or fraction thereof was determined to be $2,541. BLM sent appellant a bill, No. A-026018, for payment of the $40 additional rental due. The bill stated that the amount due was the balance of first year's rental. It also noted that in accordance with the regulation in 43 CFR 3103.3-1, the additional rental must be paid within 30 days from notice under penalty of cancellation of the lease.

The bill was mailed by certified mail (No. 9367) and received by W. J. Jacobs on February 13, 1980. The record shows that the rental deficiency was never timely paid as per this notice, nor has the deficiency been paid to date. However, BLM did not cancel the lease in the first lease year. Instead, BLM continued to treat the lease as active and to bill appellant for the correct rental amount for the lease years 1980 and 1981. Appellant's tender of $2,541 was received and accepted by BLM December 1, 1980, and again November 25, 1981. The lease was subsequently canceled for the lease year 1982 by BLM's decision which also authorized a full refund of $7,582 when the decision became final.

In his statement of reasons appellant admits that the original deficiency notice was received at his record address, but asserts that because BLM did not cancel the lease and continued to receive his yearly rental he did not think the lease was in jeopardy for any reason. He states he "has spent effort and expense" toward the development of the lease and contends it seems unfair to cancel the lease after BLM accepted his rental money. He now requests the opportunity to pay the additional $40 and retain the lease.

[1] Appellant's request may not be granted in these circumstances. The governing regulation, 43 CFR 3103.3-1, clearly sets forth the mandatory rental requirements:

> Each offer, when first filed, shall be accompanied by full payment of the first year's rental based on the total acreage if known, and if not known, on the basis of 40 acres of each smallest legal subdivision. An offer deficient in the first year's rental by not more than 10 percent will be approved by the signing officer provided all other requirements are met. The additional rental must be paid within 30 days from notice under penalty of cancellation of the lease. [Emphasis added.]

Appellant acknowledges that the bill for the $40 deficiency was delivered to his record address by certified mail and received and signed for by someone at that address. He explains there was further confusion when some secretary or clerk failed to forward the letter to his attention. This is indeed unfortunate, but the fact remains that such certified delivery of the notice to the last address of record is adequate notice of the deficiency regardless of whether he actually received it or not. 43 CFR 1810.2(b). 1/ When he failed to respond within the required 30-day period provided by the regulation, cancellation of the lease was mandatory. Albert J. Finer, 27 IBLA 61 (1976); Zona R. Jackson, 27 IBLA 217 (1976).

[2] Thus, it is evident that the lease should have properly been canceled in the first lease year for the failure to timely cure the deficiency. However, the fact that BLM did not immediately declare lease cancellation, but delayed cancellation 2 additional years before correcting this oversight, will not save the lease for appellant in the face of the mandatory requirement

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1/ 43 CFR 1810.2(b) governing communications by mail when mailing requirements are met provides:

"(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities."

of the regulation. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. 43 CFR 1810.3(a); Virgil V. Peterson, 66 IBLA 156 (1982).

[3] As for the refund of appellant's rental fees, we disagree with the State Office that appellant is entitled to a full refund for all 3-year's rental. The question of whether rental is returnable is a matter left to the discretion of the Secretary of the Interior. The statutory authority for a refund is provided by section 204(a) of the Public Land Administration Act of July 14, 1960, 43 U.S.C. § 1734 (1976), as follows:

> In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

This Board has held in several decisions that rentals may be repaid in appropriate circumstances under the repayment statute, supra. Bruce Anderson, 30 IBLA 118 (1976); Charles J. Babington, 17 IBLA 435 (1974); J. V. McGowen, 9 IBLA 133 (1973). We have noted that the over-the-counter regulation does not prohibit a refund of rental where a lease is canceled for failure to pay a deficit within the time allowed. Albert J. Finer, supra at 63. However, the Board has emphasized that we should examine the circumstances of each lease to determine if there are any factors militating against repayment. There must be no indication that the lessee derived any benefit from the possession of the lease, nor that the lessee held the lease for any length of time with knowledge that it was improperly issued. We have also pointed out that a refund might not be made if the cancellation of the lease is due to some fault of the lessee. Bruce Anderson, supra at 120; Charles J. Babington, supra at 438.

In the instant case it appears that the lessee did, in fact, enjoy the lease for 3 years, and might, inasmuch as the notice of deficiency was properly delivered, be deemed to have constructive knowledge of the deficiency. His admitted failure to either keep up with his mail at that address or to apprise BLM of a change of address where his mail could be received and noted for his appropriate attention, was of his own doing. Accordingly, he must bear the responsibility for the consequences of his own inefficiency, and a refund of the deficient rental paid for the first year is not appropriate. See generally Beard Oil Co., 1 IBLA 42, 49, 77 I.D. 166, 171 (1970) (Stuebing, A. J., concurring).

This does not follow for the succeeding 2-years's rental payment where appellant timely paid the correct rental amounts at BLM's request. He should not have to suffer the loss of these payments because of the BLM oversight in failing to cancel the lease the first year.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed insofar as it granted a refund of the rental paid for the second and third year, and set aside and remanded as it granted repayment for the deficient rental for the first year rental for lease U-40545.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge